82-693

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NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

STATE OF ILLINOIS,

Petitioner,

v.

RONALD STRUEBIN, Ancillary Administrator of the Estate of Joel F. Struebin, deceased; KATHLEEN S. POTTER, Ancillary Administrator of the Estate of James K. Potter; DAVENPORT BANK AND TRUST, Ancillary Administrator of Both Estates; and STATE OF IOWA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

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QUESTIONS PRESENTED

1. MAY THE COURTS OF THE STATE OF IOWA MAINTAIN JURISDICTION OVER THE STATE OF ILLINOIS FOR ACTS ALLEGEDLY ARISING FROM ILLINOIS' MAINTENANCE OF IOWA'S HIGHWAY PURSUANT TO AN INTERSTATE AGREEMENT WITHOUT VIOLATION OF ARTICLE IV, SECTION 1 OF THE UNITED STATES CONSTITUTION?

2. IF IOWA MAY OTHERWISE MAINTAIN JURISDICTION OVER ILLINOIS IF IOWA PERMITS ILLINOIS TO BE TRIED UNDER LESS FAVORABLE PROCEDURAL RULES THAT IOWA GRANTS TO ITSELF WHEN IT IS A DEFENDANT IN ITS OWN COURTS WITHOUT VIOLATION OF AMENDMENT V AND XIV OF THE UNITED STATES CONSTITUTION?

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The Petitioner State of Illinois respectfully prays that a Writ of Certiorari issue to review the final decision and opinion of the Supreme Court of the State of Iowa entered in this proceeding on July 21, 1982.

OPINION BELOW

The decision and order of the Supreme Court of Iowa is reported under the name Struebin v. State of Iowa at 322 N.W.2d 84 (Iowa, 1982). A copy of that decision is also contained in the Appendix to this Petition.

JURISDICTION

The decision of the order of the Supreme Court of Iowa was entered on July 21, 1982. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is

invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

The Constitution of the United States

Article IV, Section 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject

for the same offense to be twice put in jeapordy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law,; nor deny to any person within its jurisdiction the equal

protection of the laws.

Constitution of Illinois, 1970

Article XIII, Section 4

Except as the General Assembly may provide by law, sovereign immunity in this State is abolished.

STATUTORY PROVISIONS

Iowa Tort Claims Act, Iowa Rev. Stat., ch. 25A.3

Section 25A.3

Authority is hereby conferred upon the state appeal board, acting on behalf of the state of Iowa, subject to the advice and approval of the attorney general, to consider, ascertain, adjust, compromise, settle, determine, and allow any claim as defined in this chapter. If any claim is compromised, settled, or allowed in an amount of more than five thousand dollars, the unanimous approval

of all members of the state appeal board and the attorney general shall be required and the approval of the district court of the state of Iowa for Polk County shall also be required.

Claims made under this chapter shall be filed with the state comptroller, who shall acknowledge receipt on behalf of the state appeal board.

The state appeal board shall adopt rules and procedures for the handling, processing and investigation of claims, according to the provisions of the Iowa administrative procedure Act.

Section 25A.4

The district court of the state of Iowa for the district in which the plaintiff is resident or in which the act or omission complained of occurred, or where the act or omission occurred outside of Iowa and the plaintiff is a

nonresident, the Polk county district court, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any suit or claim as defined in this chapter. However, the laws and rules of civil procedure of this state on change of place of trial shall apply to such suits.

The state shall be liable in respect to such claims to the same claimants, in the same manner, and to the same extent that the state shall not be liable for interest prior to judgment or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the state were a private litigant.

Section 25A.5

No suit shall be permitted under this chapter unless the state appeal

board has made final disposition of the claim; except that if the state appeal board does not make final disposition of a claim within six months after the claim is made in writing to the state appeal board, the claimant may, by notice in writing, withdraw the claim from consideration of the state appeal board and begin suit under this chapter. Disposition of or offer to settle any claim made under this chapter shall not be competent evidence of liability or amount of damages in any suit under this chapter.

Ill. Rev. Stat. 1981, ch. 37, par. 439.8

The Court shall have exclusive jurisdiction to determine the following matters:

* * * *

(d) All claims against the State for damages in cases sounding in tort, if a

like cause of action would lie against a private person or corporation in a civil suit. . . .

Ill. Rev. Stat. 1981, ch. 127, par. 801

Except as provided in "AN ACT to create the Court of Claims, to prescribe its powers and duties, and to repeal AN ACT herein named", filed July 17, 1945, as amended, the State of Illinois shall not be made a defendant or party in any court.

STATEMENT OF THE CASE

This cause arises from an automobile accident, December 8, 1978, on an interstate highway bridge, part of Interstate Highway 80, spanning the Mississippi River between the cities of Moline, Illinois and LeClaire, Iowa. Plaintiffs' (here Respondents) Struebin's and Potter's decedents were killed when their vehicle left the roadway surface

and plunged from the surface of the bridge into the Mississippi River. At the time of the accident the decedents' vehicle was headed easterly (southbound across the bridge), departing Iowa and entering Illinois. The vehicle left the surface of the bridge pavement while still on the Iowa side of the river. At the time of the accident snow control maintenance for the entire surface of the bridge, whether located in Illinois or Iowa, was the responsibility of the State of Illinois Department of Transportation. Illinois acquired the responsibility for Iowa's portion of the bridge by the terms of a cooperating agreement executed by Illinois and Iowa. Illinois accepted responsibility for the snow control maintenance of the entire Interstate 80 bridge, in return for which the State of Iowa accepted snow control maintenance for the entire

length of the Interstate 74 bridge, also located over the Mississippi River in the environs of Moline, Illinois, and Davenport, Iowa.

On April 2, 1980, the decedents' ancillary administrators filed suit against the State of Iowa as a Defendant for its failure to maintain properly the road surface, which failure was allegedly the proximate cause of Plaintiffs' decedents' death.

Subsequently, on November 4, 1980 the State of Iowa moved to require the State of Illinois to be added as an indispensible party on the theory that the State of Illinois was ultimately responsible for any judgments returned against the State of Iowa, owing to the interstate agreement which transferred actual physical control of the bridge for snow removal to the State of Illinois. Iowa, apparently believing

that 28 U.S.C.§1251 prevented the filing of a crossclaim under Iowa Rules of Practice, sought to require the Plaintiffs, the ancillary administrators, to join Illinois as an indispensible party Defendant. On December 1, 1980, the District Court for Scott County, Iowa, allowed the Petition and on December 5, 1980 Plaintiffs filed their Amended Petition at Law, naming the State of Illinois a Defendant.

The State of Illinois appeared specially under the provisions of Iowa Rule of Civil Procedure 66 to raise the defense of sovereign immunity, a defense established under Illinois law, thereby contesting the Court's jurisdiction. After matters raised in the special appearance were briefed and argued, the District Court, on May 29, 1981, overruled the special appearance, relying on the doctrine announced by this Court in

State of Nevada v. Hall, 440 U.S. 410 (1979), and on the public policy of the State of Iowa.

The State of Illinois submitted a Petition for Grant of Interlocutory Appeal to the Supreme Court of Iowa on June 12, 1981. Three issues were raised on interlocutory appeal by the State of Illinois:

> (1) The decision in State of Nevada v. Hall, 440 U.S. 410 was inapplicable to the case at hand since the alleged dereliction of the State of Illinois concerned sovereign activities performed in Iowa at the request of the State of Iowa;
>
> (2) If the courts of Iowa may nonetheless maintain personal jurisdiction over the State of Illinois, they should decline to do so on the public policy of the State of Iowa.
>
> (3) If the courts of Iowa may constitutionally maintain personal jurisdiction over the State of Illinois without offending the Full Faith and Credit clause of the United States Constitution, they may nonetheless not exercise that jurisdiction if to do so would

deny equal protection of law to the State of Illinois.

Of those three propositions the second is a matter solely of state law and is not a part of this Petition.

The matters raised in the interlocutory appeal were briefed by the parties and oral argument was held before a panel of the Supreme Court of Iowa on June 10, 1982. On July 21, 1982 the Supreme Court of Iowa rendered its decision on the jurisdictional issues presented by interlocutory appeal, affirming the decision of the District Court for Scott County to overrule the special appearance of the State of Illinois.

REASONS FOR GRANTING THE WRIT

1. The Factual Matters Of The Defenses Of The State Of Illinois Present An Appropriate Occasion For The Court To Determine The Matters Reserved In State of Nevada v. Hall, 440 U.S. 410 (1979).

In State of Nevada v. Hall, 440 U.S. 410 (1979), this Court determined that the Full Faith and Credit clause of the United States Constitution does not prohibit the courts of one state from exercising jurisdiction over another state, thereby rendering in a matter of constitutional interpretation a decision contrary to an assumption of long-standing that the several states of the union were immune from suit in their sister states. The Court, however, added by way of footnote, that the case before the Court did not call upon the Court to determine if its decision might be different under different policies of the forum or party states. State of Nevada v. Hall concerned a driver from the State of Nevada who, driving a University of Nevada vehicle in California, was involved in a traffic

accident which injured another person. The Nevada employee was killed, but his estate was sued by the injured California resident in the Superior Court in and for San Francisco County, for the negligent operation of a motor vehicle. The State of Nevada was named as a second Defendant as the employer of the driver. The Supreme Court of California determined that the trial courts of California could exercise jurisdiction over the State of Nevada, and need not respect Nevada's $25,000 limit on tort judgments against the state. This Court affirmed, concluding that the Full Faith and Credit clause of the United States Constitution conferred no immunity on any state to be free from the jurisdiction of the courts of its sister states, despite sovereign immunity defenses which might be raised in the Defendant state's own forums.

Although this Court's decision was cast in broad terms, the fact pattern underlying it was relatively narrow. The act complained of, negligent driving, and the legal basis of liability of the State of Nevada, respondeat superior, constituted long-standing and well recognized causes of action which did not implicate the exercise of sovereign powers of the State of Nevada. Moreover, the State of California had long since abolished sovereign immunity and was according Nevada no different treatment than it would impose upon itself had California's own agents and officers been alleged to have committed the same torts. In sum, the case involved negligent driving, a non-governmental activity, which the State of California proposed to handle in precisely the same way it would handle a traffic accident

involving one of California's own employees.

Nonetheless, this Court itself acknowledged, in Footnote 24 of State of Nevada v. Hall, that it had no occasion to determine what other circumstances or policies might call for a different decision. In Footnote 24 this Court wrote:

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada could hardly interfere with Nevada's capacity to fill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or of Nevada might require a different analysis or a different result.

410 U.S. at 424, N.24. The present case affords an opportunity to examine further "different state policies [which] might require a different

analysis or a different result."

In acting to implement the snow removal maintenance agreement entered into by Iowa and Illinois, Illinois was not merely furthering its own sovereign purposes but those of Iowa as well. Unlike the employee of Nevada in State of Nevada v. Hall, whose acts were neither of a sovereign nature nor of any benefit to the State of California, those employees of the State of Illinois charged with snow removal were present in Iowa at Iowa's express invitation, to discharge a responsibility typically that of a sovereign (the maintenance of state and interstate highways) for Iowa's benefit, and for Illinois' insofar as the agreement required Iowa to perform a similar service for the benefit of the State of Illinois. It can scarcely be denied that the agreement provides mutual benefit; snow

plows are difficult if not impossible to turn around in the middle of a bridge. As a practical consequence of plowing part of a bridge one must continue to the other side in order to turn the snow removal vehicle around. The snow blade could of course be raised at the state line, allowing the vehicle to continue into the sister state without actually performing maintenance. That would seem, however, to be a silly and pointless use of both natural and human resources. In such circumstances an agreement which provides that "we will plow your section of one road bridge if you will plow ours of another" is an interstate solution of elegance and simplicity to a problem which could be time consuming, costly, and potentially dangerous if not so settled. The act, however, of snow maintenance, nonetheless constitutes the act of a sovereign

in the state operating beyond its borders for the benefit of another sovereign.

Neither can the problem be limited to the factual circumstances which give rise to it. Illinois and Iowa share many bridges in common, as do Illinois and Kentucky, and Illinois and Indiana. Each of those bridges subjects both participating states to the law of the other if the doctrine established in State of Nevada v. Hall is applied unabated to the acts of states discharging their governmental responsibilities. Illinois or indeed any other state which wishes to maintain interstate agreements with one or more states, may find its primary conduct toward its own activities, including the time, material and manpower to be committed to the activity, governed by two or more conflicting laws, its own

law and the law of two or more sister states with which it has reciprocal agreements. To the extent that a state is able to avoid contact with another it may preserve itself free from the liability of suit in another state, but only at the cost of sacrifice of that cooperation which makes interstate solutions to interstate problems possible. In contrast, to the extent that the several states of the union cannot avoid contact and commerce with each other they may find themselves unwillingly subject to the jurisdiction of the courts of a sister state. For as this Court pointed out in the decision in State of Nevada v. Hall the sovereignty which states of the union possess is not a complete and full sovereignty as the term may be understood in international law. The corollary of limitation of sovereignty

is that the states of the union may not resort to the kinds of sanctions one against the other a truly free sovereign could against another whose policies or practices offended. Plainly, Illinois cannot withdraw from all commerce and contact with Iowa simply because it does not wish to be held responsible in Iowa's courts; neither can it make war, real or economic, on Iowa to redress the grievances it may feel it has suffered at the hands of Iowa courts. To the extent the several states of the union have surrendered partial sovereignty to the general union, they may require the intercession of the federal government in order to preserve the remaining elements of sovereignty which survive to them.

Courts other than the Supreme Court of Iowa have given a broad interpretation to the doctrine announced

in State of Nevada v. Hall and have rendered decisions, which while distinguishable from the present case nonetheless may impinge, or tend to impinge upon the capacity to exercise sovereign power. In Wendt v. County of Osceola, Iowa, 289 N.W.2d 67 (Minn. 1979) a case similar to the one before the Court, the Minnesota Supreme Court held that Osceola County, Iowa was amenable to suit in the courts of Minnesota. Wendt was decided at least in part on the basis of State of Nevada v. Hall. In Ehrlich-Bober & Co. v. University of Houston, 427 N.Y.S.2d 599, 49 N.Y.2d 574, 404 N.E. 2d 726 (1980) the Court of Appeals of New York applied Nevada v. Hall to breach of contract action, allowing the University of Houston, an entity of the State of Texas, to be sued in the Supreme Court of New York. In yet another case,

Daughtry v. Arlington County, Virginia, 490 F.Supp. 307 (D.C. D.C. 1980), the District Court for the District of Columbia held that a Virginia County policeman and the county for which he worked were amenable to suit in the District Court for the District of Columbia for the torts which he might have committed while in hot pursuit of an offender from the State of Virginia. More recently in the case of Peterson v. Texas, 635 P.2d 241 (Colo. Ct. App. 1981) the Court of Appeals of Colorado determined that Texas was amenable to suit in the Colorado courts to answer for the torts committed by a resident of a Texas juvenile rehabilitation program in Colorado. In that case, the Texas juvenile rehabilitation program was actually physically located in Colorado. It is not, of course, pertinent at this point whether the cases cited were

correctly decided. For the purpose of this Petition it is important to note that the courts of the several states are with increasing frequency exercising jurisdiction over sister states in matters which may touch upon the exercise of sovereign powers, and citing as authority for that jurisdiction State of Nevada v. Hall. It is appropriate, therefore, for this Court to consider the present case because it offers an opportunity to construe the limitations placed upon State of Nevada v. Hall in Footnote 24.

2. If State Of Iowa Can Maintain Jurisdiction Over The State Of Illinois Without Offense To The Full Faith And Credit Clause, Article IV, Section 1 Of The United States Constitution, It Nonetheless Must Not Deny To Illinois Equal Protection Of The Law.

If, under Iowa law, Illinois must stand in no better stead than Iowa

itself as a litigant in Iowa courts, still it must not stand in a worse one lest it be the victim of unequal treatment under law.

Although states have never heretofore been considered persons so as to require their equal treatment under law in order to comport with the requirements of Amendments V and XIV of the United States Constitution, (Pennsylvania v. New Jersey, 426 U.S. 660 (1976); South Carolina v. Katzenbach, 383 U.S. 301 (1966)) the now recognized principle that they may be sued in the courts of other states may require reassessment of the meaning of the term "person" as a element of constitutional analysis concerning due process of law and its implied corollary, equal protection of law. The problem is one which has arisen only since and because of the decision in

State of Nevada v. Hall. While states could not be sued in the courts of sister states the question of their treatment in those courts simply could not arise. Now that they can, be a further question emerges. Can the forum state treat the Defendant state differently than it would treat itself were it the Defendant in its own forum. The case for which the Writ of Certiorari is sought squarely presents this issue.

Iowa's Tort Claims Act, which modifies Iowa's doctrine of sovereign immunity, expressly requires that a Plaintiff exhaust his administrative remedies provided in the Act before suit may be brought against the state in the District Court. Iowa's Tort Claims Act confers upon the State Appeal Board the authority to adjust and settle tort claims against the state. Section 25A.3, Revised Statutes. More

significantly, by the terms of Section 25A.5 of the Iowa Revised Statutes, no suit is ripe for prosecution in the state District Court until the Appeal Board has made a final disposition of the claim or has delayed for more than six months after the claim is made to render a decision. Finally, at the time the instant suit was brought, all tort suits against the state were required to be tried to the court. Because the instant suit was filed before recent amendments to effect permiting trial of the state trot cases to a jury, this suit, if it proceeds, to trial against the State of Iowa will be tried to the court. Illinois' liability may be tried to a jury.

If the Iowa District Court for Scott County entertains jurisdiction over Illinois the opportunity for the exercise of agency expertise and

administrative resolution of issues, thought to be important to the State of Iowa when it is itself a Defendant, will be denied to the State of Illinois. Moreover, while Iowa is undeniably permitted to bring its case to the court, to be tried by the judge, the State of Illinois must submit to the verdict of a jury. As a stranger in Iowa, Illinois is subject to the same risk of prejudice at the hands of an Iowa jury that is thought to justify the diversity jurisdiction of the federal courts, a jurisdiction which the State of Illinois cannot avail itself of, inasmuch as it is not a person within the meaning of 28 U.S.C. §1332.

In this second regard the instant case is unlike State of Nevada v. Hall, where California sought to impose no procedural or substantive law on the State of Nevada other than that which it

would have imposed upon itself had it been the Defendant in its own forum.

This Court should take the instant case in order to determine whether or not a state must accord a sister state the same treatment it offers itself. To do so may require the reexamination of the Fifth and Fourteenth Amendments to the United States Constitution to determine if the word "person" should include states, at least in the limited circumstances wherein states are sought to be made Defendants in the courts of sister states.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the

decision and order of the Supreme Court of the State of Iowa.

Respectfully submitted,

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IN THE SUPREME COURT OF IOWA

RONALD STRUEBIN, Ancillary Administrator of the Estate of Joel F. Struebin, deceased; KATHLEEN S. POTTER, Ancillary Administrator of the Estate of James K. Potter; and DAVENPORT BANK AND TRUST, Ancillary Administrator of both Estates,	)	Filed July 21, 1982
Appellees,	)	
vs.	)	250 / 66836
STATE OF IOWA,	)	
Appellee, and	)	
STATE OF ILLINOIS,	)	
Appellant.	)	

Appeal from Scott District Court - Margaret S. Briles, Judge.

Appeal with permission by the State of Illinois from order overruling its

special appearance in a tort suit. AFFIRMED.

Tyrone C. Fahner, Attorney General, and A. L. Zimmer, Assistant Attorney General, State of Illinois for appellant.

Rand S. Wonio of Lane and Waterman, Davenport, for appellees Struebin, Potter, and Davenport Bank and Trust.

Thomas J. Miller, Attorney General, and Robert J. Huber, Assistant Attorney General, for appellee State of Iowa.

Considered en banc.

McCORMICK, J.

The questions here are whether principles of constitutional law or comity required the trial court to sustain the special appearance of defendant State of Illinois in this wrongful death tort action. We granted

interlocutory appeal of the court's order overruling the special appearance in order to decide these issues of first impression in Iowa. Because we find that the principles relied on by Illinois do not bar the action, we affirm the trial court.

Plaintiffs are the ancillary administrators of the estates of Joel F. Struebin and James K. Potter. They allege that the decedents were killed when a jeep they were occupying plummeted into the Mississippi River after skidding over a snow embankment covering a railing on the Iowa side of the Interstat 80 bridge near LeClaire. A contract between Iowa and Illiois required Illinois to maintain the bridge on behalf of both states. Iowa had a similar duty on the Interstate 74 bridge. Plaintiffs allege that Illinois is liable for the deaths on theories of

negligence and nuisance based on the conditions that caused the accident. Iowa is also a defendant in the case.

In appearing specially, Illinois alleged that sovereign immunity precluded suit against it in an Iowa court. It also cited an Illinois statute requiring tort claims against the state to be brought in the Illinois Court of Claims and imposing a $100,000 per person limit on recovery. See Ill. Rev. Stat. ch. 37, §§ 439.8 and 439.23 (1979). When the trial court overruled the special appearance, Illinois applied and obtained permission for the present appeal. We are called upon to decide only the jurisdictional dispute.

I. The constitutional questions. For the first two hundred years of this nation's existence it was generally assumed that the United States Constitution would not allow one state

to be sued in the courts of another state. The assumption was based on the theory that this immunity was an attribute of state sovereignty that was preserved in the Constitution. See Paulus v. South Dakota, 58 N.D. 643, 227 N.W. 52 (1929); Nathan v. Virginia, 1 Dall. 77 (C.P. Philadelphia County Ct. 1781). In 1979, however, the Supreme Court held in Nevada v. Hall, 440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979), that the assumption was unwarranted.

Hall was a negligence action brought in a California state court against the State of Nevada by persons who were severely injured in a collision on a California highway with an employee of Nevada acting within the scope of his employment. Although a Nevada statute waived sovereign immunity against Nevada tort claims, it limited recovery to

$25,000 per claimant. The California court rejected Nevada's assertions that it was not amendable to suit in California and that, in any event, California was required to give full faith and credit to the Nevada statute limiting recovery. After the injured parties recovered a substantial judgment, the court of appeals affirmed and the California Supreme Court denied review. Nevada then successfully sought certiorari review in the U. S. Supreme Court. That Court found nothing in the understanding of the framers, the structure of the Constitution, article III, the eleventh amendment, or the full faith and credit clause that required California to accord Nevada immunity from suit in California or to apply the Nevada statute.

As in Hall, it is argued in this case that the full faith and credit

clause is a bar to suit. That provision requires full faith and credit "in each state to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. Art. IV, § 1. In Hall the Court held that this clause does not require one state to apply another state's law in violation of its own legitimate public policy. 440 U.S. at 422, 99 S. Ct. at 1189, 59 L. Ed. 2d at 426. The Court characterized California's policy interest as "full protection of those who are injured on its highways through the negligence of both residents and nonresidents." Id. at 424, 99 S. Ct. at 1190, 59 L. Ed. 2d at 427.

Iowa has a similar policy, reflected in section 321.498, The Code, extending personal jurisdiction to nonresident motorists. The policy is also manifested in chapter 25A, which permits

suits against the state for negligent maintenance of highways. See Hunt v. State, 252 N.W.2d 715, 717 (Iowa 1977). Iowa law permits full compensation.

Illinois seeks to distinguish the present case from Hall by pointing out that its duty to maintain the interstate bridge arose from a contract that it entered in its sovereign capacity in a spirit of cooperative federalism. It asserts that footnote 24 in Hall limits the holding to its unique facts, leaving intact an allegedly preexisting constitutional bar to state court jurisdiction over sister states where liablity is alleged based on the sister state's exercise of a governmental function. Footnore 24 provides:

> California's exercise of jurisdiction in this case poses no substantial threat to our constitutional system of cooperative federalism. Suits involving traffic accidents occurring outside of Nevada

> could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities. We have no occasion, in this case, to consider whether different state policies, either of California or Nevada, might require a different analysis or a differet result.

We see several flaws in Illinois' position. First, the Hall case enunciates for the first time an authoritative general principle that the Constitution does not mandate interstate comity. It demonstrates that the prior contrary assumption was unwarranted. The case does not merely carve out an exception to a general principle of immunity. Second, the footnote points out that the Hall facts did not threaten Nevada's sovereign prerogatives and responsibilities. It does not necessarily limit the holding to the Hall facts. Finally, the footnote merely reserves the question of a different analysis or result where

different state policies are involved. It does not suggest that an exception must be made where, as here, a threat to interstate cooperation is asserted. We do not think that allowing Illinois to be sued in Iowa courts for torts committed in Iowa constitutes a "substantial threat to our constitutional system of cooperative federalism."

Illinois does not and could not claim a sovereign right to be negligent in carrying out its contractual responsibilities in maintaing the Interstate 80 bridge. The fact that it accepted the responsibilities as a sovereign does not make them any less obligatory. Moreover the only substantive Illinois policy involved is reflected in its statute that would limit recovery if the action were brought in Illinois. This is the same

kind of policy as was urged by Nevada in Hall. Under Hall this policy is not of sufficient magnitude to override Iowa's legitimate interest in giving full access and protection in Iowa courts to those injured on Iowa highways. No substantial harm to Illinois' sovereignty appears. Illinois is more impressed with the views of the dissenting justices and critics of Hall than with the majority holding. We believe, however, the majority holding plainly controls here.

Other courts have uniformly reached the same conclusion in variouis contexts, some of which are analogous to this case. See Daughtry v. Arlington County, Virginia, 490 F. Supp. 307 (D.D.C. 1980) (District of Columbia courts not required to recognize sovereign immunity of Virginia in suit based on alleged misconduct of police

exercising Virginia police powers); Peterson v. Texas, 635 P.2d 241 (Colo. Ct. App. 1981) (Texas not immune from Colorado suit based on alleged tort of youth participating in Colorado in a Texas juvenile rehabilitation program); The Carlson Corporation v. University of Vermont, Mass. Adv. Sheets (1980) 659 (Mass. March 6, 1980) (sovereign immunity of Vermont not a bar to breach of contract suit against Vermont state university in Massachusetts); Wendt v. County of Osceloa, Iowa, 289 N.W.2d 67 (Minn. 1979) (Iowa political subdivision not immune from suit in Minnesota court for alleged negligent failure to post adequate road signs and barricades); Ehrlich-Bober & Co., Inc. v. University of Houston, 49 N.Y.2d 574, 427 N.Y.S.2d 604, 404 N.E.2d 726 (1980) (another university contract case).

We conclude that the trial court was correct in overruling Illinois' special appearance on the full faith and credit ground.

Illinois also alleges the trial court ruling denies it equal protection of the law under U.S. Const. Amend. XIV. This occurs, it argues, because Iowa could not be sued in its own courts under the tort claims statute without prior exhaustion of administrative remedies. See § 25A.5; Jones v. Bowers, 256 N.W.2d 233 (Iowa 1977). Illinois asserts it is treated unequally because it does not receive the benefit of the exhaustion requirement. Passing the issue whether error was presented on this contention, we hold that it is without merit. A state is not a "person" for purposes of fourteenth amendment protection. Pennsylvania v. New Jersey, 426 U.S. 660, 96 S. Ct. 2333, 49 L. Ed. 2d 124 (1976).

II. The comity question. Iowa is nevertheless free to close its courts to suits against a sister state as a matter of comity rather than constitutional command. See Hall, 440 U.S. at 426-27, 99 S. Ct. at 1190-91, 59 L. Ed. 2d at 429. Comity is a doctrine under which courts will give effect to the law of another state as a matter of deference and respect rather than of duty. Jacobsen v. Saner, 247 Iowa 191, 193, 72 N.W.2d 900,901 (1955).

Illinois alleges that Iowa and Illinois have a similar view toward sovereign immunity which should encourage Iowa to respect its desire to have litigation against it brought only in the Illinois Court of Claims, as provided in its statute. Assuming the states do have a common view of the doctrine, no basis appears for believing Illinois' sovereignty will not be

sufficiently protected in Iowa courts. See Comment, Nevada v. Hall: Sovereign Immunity, Federalism and Compromising Relations Between Sister States, 1980 Utah L. Rev. 395, 410. Illinois acknowledges its statute permits an action against the state for negligence in road maintenance.

The only material difference asserted by Illinois is its statutory limitation on recovery. The Illinois policy limiting the amount of recovery against the state for torts in Illinois contrasts with the Iowa policy permitting full compensation to those injured on its highways by the negligence of nonresidents as well as residents. We believe Iowa's interest in full compensation outweighs Illinois' interest in extending its statutory limitation on recovery to its Iowa torts. Iowa's policy is a legitimate

attribute of its own sovereignty. Therefore we conclude that the trial court was also correct in overruling the special appearance on the commity ground.

AFFIRMED.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 1982 three copies of this Petition for Writ of Certiorari were mailed postage prepaid to the counsel and parties listed below. I further certify that all parties required to be served have been served:

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CLERK

NO. 82-693

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

STATE OF ILLINOIS,

Petitioner,

v.

RONALD STRUEBIN, Ancillary Administrator of the Estate of Joel F. Struebin, deceased; KATHLEEN S. POTTER, Ancillary Administrator of the Estate of James Potter; DAVENPORT BANK AND TRUST, Ancillary Administrator of Both Estates; and STATE OF IOWA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Iowa

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STATUTORY PROVISIONS AND RULES OF COURT

Ill. Ann. Stat., ch. 37 § 439.8(d)

The court shall have exclusive jurisdiction to hear and determine the following matters:

> (d) All claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit, and all like claims sounding in tort against the Medical Center Commission, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universitites System or the Board of Governors of State Colleges and Universities; provided, that an award for damages in a case sounding in tort, other than certain cases involving the operation of a State vehicle described in this paragraph, shall not exceed the sum of $100,000 to or for the benefit of any claimant. The $100,000 limit prescribed by this Section does not apply to an award of damages in any case sounding in tort arising out of the operation by a State employee of a vehicle owned, leased or controlled by the State. The defense that the State or the Medical Center Commission or the Board of Trustees of the University of Illinois, the Board of Trustees of Southern

Illinois University, the Board of Regents of the Regency of Governors of State Colleges and Universities is not liable for the negligence of its officers, agents, and employees in the course of their employment is not applicable to the hearing and determination of such claims.

Iowa Rule of Civil Procedure 66

66. Special appearance. A defendant may appear specially for the sole purpose of attacking the jurisdiction of the court, but only before taking any part in a hearing or trial of the case, personally or by attorney, or filing a motion, written appearance, or pleading. The special appearance shall be in writing, filed with the clerk and shall state the grounds thereof. If the special appearance is erroneously overruled, defendant may plead to the merits or proceed to trial without waiving such error.

Iowa Rule of Civil Procedure 177

177. Demand for jury trial.

(a) Jury trial is waived if not demanded according to this rule; but a demand once filed may not be withdrawn without consent of all parties not in default.

(b) A party desiring jury trial of an issue must make written demand therefor by filing a separate instrument clearly designating such demand not later than ten days after the last pleading directed to that issue. If filed with the petition, the jury demand shall be served with the original notice and petition. If filed after the petition, the jury demand shall be served and filed in accordance with R.C.P. 82.

(c) Unless limited to a specific issue, every such demand shall be deemed to include all issues triable to a jury. If a limited demand is filed, any other party may, within ten days thereafter or such shorter time as the court may order, file his demand for a jury trial of some or all other issues.

(d) Notwithstanding the failure of a party to demand a jury in an action in which such demand might have been made of right, the court, in its discretion on motion and for good cause shown, but not ex parte, and upon such terms as the court prescribes, may order a trial by jury of any or all issues.

STATEMENT OF THE CASE

Respondents adopt Petitioner's Statement of the Case.

ARGUMENT

I

Petitioner Has Not Shown Sufficient Reasons to Support a Writ of Certiorari

There is no valid distinction between this case and Nevada v. Hall, 440 U.S. 410, 99 S.Ct. 1433, 59 L.Ed.2d 416 (1979), reh den 441 U.S. 917, 99 S.Ct. 2018, 60 L.Ed.2d 389 (1979). Illinois relies upon Footnote 24 of that opinion and claims that this is a case where "different state policies might require a different analysis or a different result." However, Illinois does not, as it cannot, indicate what these alleged "different state policies" are. Illinois cannot seriously claim that its state policy is to negligently maintain its roadways, so it attempts to draw spurious factual distinc-

tions between these cases. Illinois argues that the Nevada state employee who was negligently driving a state car on state business within California was engaged in a "non-governmental activity." Illinois claims that the Nevada employee's actions "were neither of a sovereign nature nor of any benefit to the State of California." In contrast, Illinois argues that its snow removal on the Iowa side of the interstate bridge is a typical responsibility of a sovereign which benefitted both Iowa and Illinois. It serves nothing to label driving a car "non-governmental activity" while asserting that snow removal is "of a sovereign nature." Illinois' employees performing snow removal in Iowa were no more nor no less on state business than the Nevada employee driving in California as part of his duties. The distinction is ludicrous

and presents no "different state policies."

The only substantive state policies involved in this case are the same as those in Nevada v. Hall, supra. In this case Illinois has a $100,000 limitation upon recoveries in tort claims brought against it. Ill. Ann. Stat., ch. 37 § 439.8(d) (Smith-Hurd). Iowa has a policy of providing full compensation to those injured on its highways. State Tort Claims Act, Chapter 25A, Code of Iowa (1978); Hunt v. State, 252 N.W.2d 715 (Iowa 1977). This is the same policy dichotomy as was urged by Nevada in Nevada v. Hall, supra. There is no reason to simply rehash that issue in this case.

Illinois also appears to argue that this exercise of jurisdiction causes problems with interstate agreements of this type, although it stops short of labeling this a "substantial threat to our

constitutional system of cooperative federalism" or an interference with its capacity to fulfill its own sovereign responsibilities. Economic warfare will not result from Illinois being required to respond for its negligence within Iowa in Iowa courts. The so-called "interstate solution of elegance" involved here could simply be made more "elegant" by contractual provisions for indemnification or some similar adjustment if the states wish to limit their liability for extra-territorial torts. This is hardly a substantial threat to cooperative federalism.

II

Illinois is Not a "Person" Protected by the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States nor is it Threatened by Unequal Treatment

Illinois raises the argument for the first time that it will be subjected to different procedural requirements in Iowa

because the case could be decided by a jury. The only difference in treatment asserted by Illinois before the Iowa Supreme Court was its statutory limitation on recovery. Not only was this new ground not preserved for appeal, but it is not a ground upon which one makes a special appearance. A special appearance is for the sole purpose of attaching the jurisdiction of the court, not to contest procedural requirements or to raise a conflict of laws. See Iowa Rule of Civil Procedure 66.

Furthermore, this contention exists in a vacuum. Even assuming, arguendo, that plaintiffs could have demanded a jury as to Illinois, they did not. The right to a jury trial is waived if not so demanded. Iowa Rule of Civil Procedure 177(a).

In any event, the Equal Protection Clause of the Fourteenth Amendment extends

protections to "persons", not to states. It makes a mockery of the language of the Fourteenth Amendment to urge otherwise. As stated by this Court in Pennsylvania v. New Jersey, 426 U.S. 660, 96 S.Ct. 2333, 49 L.Ed.2d 124 (1976): "The short answer to these contentions is that both clauses protect people, not States." 426 U.S. at 665. See also, South Carolina v. Katzenbach, 338 U.S. 301 (1966).

CONCLUSION

There are no special or important reasons for the Court to exercise its discretion and grant review on writ of certiorari. This is not a state court decision on an important question of federal law which has not been, but should be, settled by this Court. See generally, Rule 17(1)(c), Rules of the Supreme Court of the United States. This question was decided by Nevada v. Hall. The Petition for a Writ of Certiorari should be denied.

AFFIDAVIT OF SERVICE

The undersigned hereby certifies that on the 18th day of November, 1982, three copies of this Brief in Opposition to Petition for a Writ of Certiorari were mailed postage prepaid, pursuant to Rule 28(c) of the Rules of the Supreme Court of the United States, to the counsel and parties listed below. I further certify that all parties required to be served have been served.

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